

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JAMES MATTHEW RENFROE**

Claimant

VS.

**RAYTHEON AIRCRAFT COMPANY**

Self-Insured Respondent

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Docket No. 1,021,448

**ORDER**

Claimant appeals the August 8, 2007 Award of Administrative Law Judge Brad E. Avery. Claimant was awarded benefits for an 8 percent permanent partial disability to the left lower extremity, on a functional basis, but denied an award for an alleged injury to his low back. The Administrative Law Judge (ALJ) determined that the opinion of board certified physical medicine and rehabilitation specialist Terrence Pratt, M.D., that claimant had no permanent disability to the back from the injury suffered on May 26, 2004, was the most credible.

Claimant appeared by his attorney, Bruce A. Brumley of Topeka, Kansas. Respondent appeared by its attorney, Clifford K. Stubbs of Roeland Park, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. Additionally, at oral argument to the Board, the parties stipulated that the transcript of the deposition of Jeff McDonald, taken on July 27, 2007, and the transcript of Preliminary Hearing, held on February 20, 2006, even though not listed in the Award of the ALJ, are a part of the record for the purposes of this appeal.<sup>1</sup> The Board heard oral argument on November 13, 2007.

**ISSUES**

1. What is the nature and extent of claimant's injuries and disability?  
Claimant contends the accident which occurred on May 26, 2004,

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<sup>1</sup> Exhibit 2 of the Deposition of Theodore L. Sandow, Jr., M.D., which is the January 12, 2005 report of Dr. Sandow, is missing page 6 of the report. The page can be located in Respondent's Exhibit A of the Preliminary Hearing transcript.

not only resulted in an injury to his left knee, but also resulted in a significant limp. Claimant alleges the resulting altered gait caused pain in his left hip, low back and neck. Respondent contends that claimant has exaggerated the extent of and even the existence of a limp. Therefore, the alleged injuries to claimant's hip, back and neck were either grossly exaggerated or made up. Accordingly, respondent argues claimant should thus be limited to an award for the injury to his left knee only.

2. Should the DVD surveillance of claimant be admitted into evidence? Claimant contends that DVD surveillance footage of claimant should either be excluded from this record, or given no weight when considering the extent of claimant's injuries and disability. Respondent argues the DVD footage proves that claimant is greatly exaggerating or outright fabricating his hip, back and neck problems.

#### **FINDINGS OF FACT**

Claimant, an aircraft maintenance mechanic, began working for respondent in November 2000. Claimant had worked in aircraft maintenance most of his adult life. On May 26, 2004, while crouching to remove a wheel brake assembly on an aircraft, claimant felt his left knee pop and he had an immediate onset of severe pain. Claimant came under the care of orthopedic surgeon Michael J. Schmidt, M.D. Dr. Schmidt ordered an MRI, which was performed on July 6, 2004. The MRI showed significant damage, including a left medial meniscal tear. Dr. Schmidt performed arthroscopic surgery on claimant on July 20, 2004, including a partial meniscectomy. Claimant was last seen by Dr. Schmidt on November 9, 2004. Claimant testified that he developed a significant limp after the surgery. The limp was described by claimant as profuse and occasionally required that claimant use a cane. At times, claimant would be unable to walk. He would have to sit down. As a result of this limp, claimant began having problems with his hip, lower back and neck.

In December 2004, claimant moved to San Antonio, Texas, when respondent's Topeka facility closed. Claimant intended to try to get a job with respondent at its San Antonio facility. As of the regular hearing, claimant was unemployed.

In 1998, claimant was diagnosed with chronic myelitic leukemia. As a result, claimant is taking a leukemia medication called Gleevec.

Claimant was referred by his attorney to board certified orthopedic surgeon Theodore L. Sandow, Jr., M.D., for two examinations, the first on January 12, 2005, and the second on September 20, 2005. Besides the knee complaints, claimant was having

significant back problems for which he had been receiving chiropractic treatments. Dr. Sandow attributed the back problems to the abnormal gait which occurred after claimant's injury and knee surgery. Dr. Sandow diagnosed claimant as post surgery to the left knee and with cervical and lumbar musculoligamentous strain. He rated claimant pursuant to the *AMA Guides*<sup>2</sup> at 4 percent permanent partial disability to the body for the left knee and under DRE Category II at a 5 percent permanent partial impairment for the low back problems. He attributed claimant's impairments to the May 26, 2004 injury with respondent. Dr. Sandow noted claimant had earlier been diagnosed with chronic myelogenous leukemia and is on Gleevec. The side effects of being on Gleevec include neuropathy of the lower extremities, musculoskeletal pain, arthralgia and myalgia. Dr. Sandow agreed that the adverse reactions associated with this medication are directly in accord with the type of complaints claimant had made to his low back. Dr. Sandow was unable to state whether claimant's complaints were the result of the injury or the result of the leukemia and corresponding treatment. He did initially testify that it is a probability of 51 percent or greater that claimant's complaints are related to the knee injury. Dr. Sandow was asked to consider the task list created by vocational expert Richard Santner. Of the 19 tasks listed by Mr. Santner, claimant would be unable to perform 13, for a 68 percent task loss.<sup>3</sup>

Claimant was referred by the ALJ to board certified physical medicine and rehabilitation specialist Terrence Pratt, M.D., for an independent medical examination on January 9, 2007. Dr. Pratt diagnosed claimant with a history of left medial meniscal tear, post meniscectomy and low back pain with reported degenerative disc disease. He noted that during his examination of claimant, claimant was holding onto objects in the examination room. Claimant was not putting any weight on his left leg during the examination. When claimant did put the left leg down, he quickly lifted it up again.<sup>4</sup> During his examination of claimant, Dr. Pratt noted an inconsistency in the straight leg test. Dr. Pratt also noted claimant's history of chronic myelitic leukemia and the medication, Gleevec, which claimant was taking. Dr. Pratt also agreed that the symptoms in claimant's low back were consistent with the symptoms that could result from being on Gleevec.

Dr. Pratt rated claimant at an 8 percent functional impairment to the lower extremity (3 percent whole body) for the knee injury, pursuant to the fourth edition of the *AMA Guides*.<sup>5</sup> He rated claimant at a 5 percent whole body impairment for the back, due to the altered gait. In reviewing the task list of Mr. Santner, Dr. Pratt found claimant unable to

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<sup>2</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

<sup>3</sup> See Claimant's Stipulation Number One Dick Santner and Claimant's Stipulation Number Two Theodore Sandow, M.D.

<sup>4</sup> Pratt Depo. at 15.

<sup>5</sup> *AMA Guides* (4th ed.).

perform 12 of the 19 tasks, for a 63 percent task loss. Dr. Pratt was provided with the reports of Dr. Schmidt and Eradio Arredondo, M.D., of San Antonio, Texas, who treated claimant for a short period of time in Texas. Dr. Pratt did not recall any mention of back pain in the reports of Dr. Schmidt. Neither does he recall any mention of back complaints or a limp in the reports of Dr. Arredondo.

After the examination of claimant, Dr. Pratt was provided a copy of a DVD<sup>6</sup> which contained surveillance of claimant. The video, which was shot on September 25, 2006, displayed claimant walking with a different gait pattern than that displayed in Dr. Pratt's office. Dr. Pratt described claimant's gait in the DVD as normal, as opposed to an antalgic gait pattern of avoiding weight bearing with the left lower extremity, as when claimant was last examined by Dr. Pratt. Dr. Pratt was asked, in light of the inconsistencies between claimant's actions during Dr. Pratt's examination, a lack of problems noted in the contemporaneous medical records, and the evidence displayed on the DVD, whether he could say within a reasonable degree of medical probability whether claimant had any back impairment attributable to the May 26, 2004 accident with respondent. Dr. Pratt answered "no".<sup>7</sup>

The ALJ, after reviewing the DVD, agreed with the opinion of Dr. Pratt in finding claimant could walk without a significant limp and could easily navigate stairs. The ALJ then determined that claimant had failed to prove his alleged back injury was caused, accelerated or aggravated by the knee injury.

#### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>8</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>9</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

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<sup>6</sup> McDonald Depo., Ex. 1.

<sup>7</sup> Pratt Depo. at 19-20.

<sup>8</sup> K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

<sup>9</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>10</sup>

The two phrases “arising out of” and “in the course of,” as used in K.S.A. 44-501, et seq.,

... have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase “in the course of” employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer’s service. The phrase “out of” the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”<sup>11</sup>

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker’s employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.<sup>12</sup>

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate or accelerate a preexisting condition. This can also be compensable.<sup>13</sup>

In workers compensation litigation, it is the claimant’s burden to prove his or her entitlement to the benefits requested. In satisfying that burden, a claimant’s testimony is, in most situations, prominent. As such, the credibility attached to a claimant’s testimony is essential. Here, claimant’s credibility has been adjudged lacking. Neither Dr. Pratt nor the ALJ nor the Board is persuaded by claimant’s inconsistent display of alleged physical limitations. The Board agrees with the ALJ’s finding that claimant has failed to prove his alleged hip, back or neck injuries were caused, accelerated or aggravated by his knee injury. The ALJ’s determination to limit claimant’s award to Dr. Pratt’s 8 percent functional rating to the left lower extremity is the proper award in this matter and is affirmed.

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<sup>10</sup> K.S.A. 44-501(a).

<sup>11</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

<sup>12</sup> *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

<sup>13</sup> *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

**CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has failed to prove that his alleged hip, back and neck complaints are the result of the injuries suffered on May 26, 2004, while employed with respondent. Claimant's award is, therefore, limited to an 8 percent permanent partial disability to the left lower extremity.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated August 8, 2007, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Bruce A. Brumley, Attorney for Claimant  
Clifford K. Stubbs, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge